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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 202

DAIRYMEN'S LEAGUE CO-OPERATIVE ASSOCIATION, INC.,
Petitioner,

v.

CHARLES F. BRANNAN, Secretary of Agriculture
of the United States.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

SEWARD A. MILLER,
Attorney for Petitioner.

FREDERIC P. LEE,
MYRON SCOTT,
Of Counsel.

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PETITIONER'S REPLY BRIEF

In general, respondent's answering brief does not meet the grounds advanced in the petition for certiorari. Instead it sets up straw men, supported by misstatements of fact which require a reply.

The argument that the interpretations and stipulation complained of concern only one of the essential elements of classification is met by the petition which shows that there were three principal questions relating to classification determined by the interpretations and incorporated in the stipulation. The argument that the controversy presented does not go beyond the case refers only to respondent's own straw men and does not mention the prin-

cipal questions presented by the petition. As to these questions respondent's brief is silent, particularly as to the questions of Administrative Law and practice involved as to the effect of the interpretations and the stipulation.

Erroneous statements in the respondent's brief are highly important in this case. The principal ones are, in substance, that the interpretations of the Market Administrator here involved were tentative and were reversed by him (p. 2, lines 16-18; p. 6, lines 12-16; p. 16, footnote; and p. 17, lines 1-12 of respondent's brief). Not only is the record bare of support to such statements but as a matter of fact they are contrary to the actual facts, as is clearly shown by the affidavit of E. M. Harmon, the then Market Administrator, annexed hereto in the Appendix, p. 1.

As a matter of fact, as shown by the affidavit and petitioner's original brief, there were three interpretations, *viz.*, (a) that a handler receiving cream at an unapproved plant was not a handler with respect to that plant; (b) that cream shipped to an unapproved county automatically took a III-D classification; and (c) that classification might be in accordance with utilization in the second cream plant which might be the third plant.

Petitioner had no knowledge of any attempted modification as to any of these interpretations prior to the conclusion of the operations here involved except that petitioner of course did know of the reclassifications and demand for payment on account of such reclassifications.

The interpretation as to who is a handler was first and merely mentioned in the review proceeding by the Judicial Officer and the reversal of the interpretation was by the Court of Appeals.

A second important erroneous statement is contained in the footnote on page 14 of respondent's brief, in substance, that the only instance in which others beside the Market Administrator approved of the interpretation was in case

of interpretations (b) and (c). An examination of the record shows clearly that the three interpretations were issued practically simultaneously and as a result of the conference between representatives of the industry, the Market Administrator and representatives of the Secretary of Agriculture at Washington and of the Department of Agriculture and Markets of New York (R. 53, 129, 130 and 131). Thus Finding No. 9 shows clearly that all three interpretations were involved in the conferences of November 26, 1938 and issuance of interpretation on December 5, 1938. There is also an error in the statement that the "handler" interpretation only involved two of the five claims of petitioner. As a matter of fact it involved all but the first.

Respondent claims that the bill dated October 20, 1939, stating amounts due from petitioner by reason of the reclassification by the office of the Market Administrator was in effect a notice of rescission of the interpretations of December 1938 (Respondent's brief, p. 16, line 18; p. 17, line 12). The notice actually covered audits of the entire operations of the petitioner and its buying dealers under the order averaging in excess of two and a half million dollars per month and of III-D sales in excess of $125,000 per month and, as clearly shown by a copy of such notice set forth in the Appendix, p. 3. No details or explanations were given by the notice sufficient to indicate any such rescissions.

Respondent also erroneously claims that petitioner did not conduct its business in reliance upon the interpretations (p. 16, lines 12-13) and that its business methods were adopted long before such interpretations and continued after the Fall of 1939 (p. 17, lines 1-3).

The Judicial Officer held that there was such reliance (R. 144, 145) and the evidence is clear that the cream sales under Claim I were stopped in November 1939 and an

entirely new method of sales of Janssen Dairy Company then adopted.

In any event, the real point in issue is whether the sales of cream in question were made in accordance with the interpretations as publicly and officially announced by the Market Administrator and whether those interpretations are to be treated as the law governing the transactions.

Respectfully submitted,

SEWARD A. MILLER,
Attorney for Petitioner.

FREDERIC P. LEE,
MYRON SCOTT,
Of Counsel.

APPENDIX

Affidavit

State of New York }
County of New York } ss.:

E. M. Harmon, Eastern Regional Representative of National Dairy Council, 437 Fifth Avenue, New York 16, N. Y., being duly sworn, deposes and says that he was the Administrator with the title of "Market Administrator" appointed by the Secretary of Agriculture as such under the New York Metropolitan Milk Marketing Order, known as Order No. 27, from September 1, 1938 to sometime in May, 1940. In December, 1938, pursuant to requests for rulings from the industry and following industry meetings and conferences held in November and December, 1938, with respect thereto, at which Mr. E. W. Gaumnitz, Chief of the Dairy Section of the Department of Agriculture at Washington, and Mr. Kenneth Fee, Director of Milk Control of the Department of Agriculture and Markets of the State of New York, were present, deponent was authorized by such federal and state officials to issue to the industry the following interpretations with respect to the classification provisions of Order No. 27: (a) that a handler receiving cream at an unapproved plant was not a handler with respect to that plant; (b) that cream shipped to an unapproved county automatically took a III-D classification; (c) that classification might be in accordance with utilization in the second cream plant which may be the third plant.

Deponent never reversed, changed or altered these interpretations. A difference of opinion, however, arose among the members of the staff of deponent's office as to (b) above, as to whether cream could remain under III-D classification if after delivery in an unapproved county it

passed directly into an approved county. Because of such differences of opinion, while deponent did not alter his position as to any of the three interpretations above and is still of the opinion that they are correct, some of the cream was re-classified from III-D to II-A (unpriced) because it was moved from its first delivery point in an unapproved county to an approved county for distribution. This was done in the expectation and desire that the League would seek a review of the reclassification and thus there would be a determination of the issue of whether interpretation (b) needed amplification in case of further movement to an unapproved county for distribution. Deponent agreed to the reclassifications being made for that purpose only. The contrary instructions of an auditor on the deponent's staff, Mr. Aldrich, expressed in a memorandum dated February 14, 1940, were not directed to be made by the deponent, were not approved by deponent and, to the very best of deponent's recollection, were never brought to deponent's attention.

E. M. Harmon.

Sworn to before me this
13th day of September, 1949.

Gerald G. Hogan,
Notary Public, State of New York.
No. 60-1826875.
Qualified in Westchester County.
Cert. filed with N. Y. Co. Clk & Reg.
Commission expires March 30, 1951.

Appendix.

COPY

MARKET ADMINISTRATOR
NEW YORK METROPOLITAN MARKETING AREA
95 Madison Avenue
New York, N. Y.

United States Secretary of Agriculture Order No. 27

COMMISSIONER OF AGRICULTURE and MARKET: of the State of New York Order No. 126

Date 10/20 1939

To: DAIRYMEN'S LEAGUE COOPERATIVE ASSOCIATION, INC.
11 West 42nd St.
New York City

PRODUCER SETTLEMENT FUND
Pool Debit Account
Under
Above Orders Article VII
Section 8 and 10

Date	NET POOL OBLIGATION Quantity Whole Milk Pounds	Amount	Published Uniform Price Value*	Debits	Credits	Balance
10-20	AUDIT ADJ. OF SEPT. REPORT 443,837	$ 7,460.21	$ 8,299.75	$ 839.54	Not Disputed	
10-20	AUDIT ADJ. OF OCTOBER REPORT 190,890	4,652.30	3,646.00	1,006.30	Disputed	
10-20	AUDIT ADJ. OF NOVEMBER REPORT 1,291,520	10,724.89	27,121.92	16,397.03	(Item #1)	
10-20	AUDIT ADJ. OF DECEMBER REPORT 1,420,270	11,738.26	28,689.45	16,951.19	Disputed (Item #2)	
10-20	AUDIT ADJ. OF JANUARY REPORT 1,235,990	9,854.89	23,236.61	13,381.72	Disputed (Item #3)	$48,575.78
	Also affects the assessment (2¢ per C)				Disputed	1,283.93
	" " " "					2,100.36

*Published Uniform Price Per Cwt.
for Pool Period Ending ..... is $.....

NOTE: If the last figure in the Balance Column is a CREDIT please acknowledge Receipt of our check on form below. If a DEBIT please complete and attach this form to your remittance.

Date 19
Handler .....
By .....
(Signature) (Title)

Amount Due to Fund $48,575.78
Check No. .....
Pool Period Ending .....
By .....
(Chief Accountant)

MARKET ADMINISTRATOR—NEW YORK METROPOLITAN MILK MARKETING AREA
95 Madison Avenue New York, N. Y.